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Attorney for Plaintiffs/Debtors,
Mosese Uhila and Mele Feofaaki Uhila

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re: Mosese Uhila and Mele Feofaaki)	Bankruptcy Case No. 10-31355
Uhila,)	
)	Adv. No.
Debtors,)	
)	
)	COMPLAINT TO SET ASIDE
<u>MOSESE UHILA AND MELE</u>)	FORECLOSURE
<u>FEOFAAKI UHILA,</u>)	
)	Judge: Honorable Dennis Montali
Plaintiff,)	
)	
vs.)	
OCWEN LOAN SERVICING, LLC;)	
DEUTSCHE BANK NATIONAL TRUST)	
COMPANY; WESTERN PROGRESSIVE,)	
LLC, their successors and assignees.)	
and DOES 1 - 20)	
Defendants.)	

1 For the complaint against the above-named Defendants, Plaintiff MOSESE UHILA a.k.a.
2 MOSES UHILA, and MELE FEOFAAKI UHILA, (hereinafter referred to as "Plaintiffs") alleges
3 as follows:

4 PARTIES

5
6 1. Plaintiffs MOSESE UHILA and MELE FEOFAAKI UHILA are residents of the City of
7 East Palo Alto, County of San Mateo, State of California. Plaintiffs are also the debtor in a
8 voluntary Chapter 13 bankruptcy proceeding, filed on April 16, 2010.

9 2. Plaintiffs are informed and believe, and upon that basis allege that defendant OCWEN
10 LOAN SERVICING, LLC ("Ocwen") is, and at all times herein mentioned was, a corporation
11 incorporated in the State of Delaware and licensed to do business in the State of California.
12

13 3. Plaintiffs are informed and believe, and upon that basis allege that defendant
14 DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for the Registered Holders of
15 Harborview Mortgage Loan Trust Mortgage Pass Through Certificates, Series 2007-7
16 ("Deutsche Bank"), form unknown, is the Trustee for the Harborview Mortgage Loan Trust
17 Mortgage Pass Through Certificates, Series 2007-7. The Harborview Loan Trust is the alleged
18 beneficiary of the Deed of Trust at issue.
19

20 4. Plaintiffs are informed and believe, and upon that basis allege that defendant WESTERN
21 PROGRESSIVE, LLC ("Western Progressive") is, and at all times herein mentioned was, a
22 corporation incorporated in the State of Delaware and licensed to do business in the State of
23 California.
24

25 5. The true names and capacities of defendants named as DOES 1 through 20 are unknown
26 to plaintiffs, and plaintiffs therefore sue said defendants by such fictitious names and ask leave of
27 this court to allow this Complaint to be amended to insert the true names and capacities of such
28

1 defendants when they become known. Plaintiffs are informed and believe and on that ground
2 allege that the fictitiously named defendants herein, and each of them, claims an interest in the
3 property hereinafter described and which is the subject of this action.
4

5 JURISDICTION

6
7 6. Plaintiffs have standing to bring this action under Title 11 of the United States Code
8 §§547(b) and 548(a) et seq.

9 7. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.
10 §1409(c). This adversary proceeding arises in the captioned bankruptcy case now pending in
11 this court.
12

13 8. This adversary proceeding is brought pursuant to Bankruptcy Rule 7001, and Title 11
14 U.S.C. §§ 547(b) and 548(a). This is a "core proceeding" under 28 U.S.C. §§ 157(b)(2)(A),
15 157(b)(2)(B) and 157(b)(2)(K).
16

17 STATEMENT OF FACTS

18 9. On December, 2, 2003 the Plaintiff, Mosese Uhila purchased a home at 2245 Euclid Ave,
19 East Palo Alto, California (the "Property").

20 10. Plaintiffs refinanced the Property on February, 6, 2006 in the name of both Plaintiffs.
21 New Century Mortgage Corporation was the lender on the 2006 loan. The loan appears to have
22 been transferred to the Harborview Mortgage Loan Trust and Trustee Deutsche Bank.
23

24 11. Due to changes in their income and material circumstances Plaintiffs became delinquent
25 on the loan in early 2009.
26
27
28

1 12. After falling into arrears on their mortgage Plaintiffs began to seek ways to meet their
2 loan commitments. With the help of an interpreter and family members they sought a loan
3 modification from Ocwen, the servicer for the first loan, beginning in September 2009.

4 13. Ocwen's representatives encouraged the Plaintiffs to seek loan modification, through the
5 Home Affordability Modification Program ("HAMP"), and made verbal representations that the
6 Plaintiffs would be approved for a trial plan and should make a monthly trial payment in the
7 amount of \$1,922.51.

8 14. Despite repeated requests for confirmation of a trial plan based on the representation of
9 the Defendant's agent, Defendant refused to provide any plan, but instead repeatedly reassured
10 Plaintiffs that a trial modification plan would be forthcoming.

11 15. On October, 9, 2009 Defendants sent a letter requesting additional documents to
12 complete a HAMP application, and Plaintiffs responded by providing these documents.

13 16. On October 20, 2009 Defendants began foreclosure proceedings against the Plaintiffs, by
14 recording a notice of Trustee Sale. A substitution of Trustee to Defendant Western Progressive
15 LLC, was also made on this date.

16 17. Agents of Defendant informed Plaintiffs that loan modification paperwork was being
17 processed and instructed them to wait rather than seek other means of preventing foreclosure.

18 18. The Notice of Trustee's Sale provided for a sale on November 10, 2009, but the Trustee's
19 Deed Upon Sale states that the sale was conducted on December, 1, 2010.

20 19. Defendant Ocwen continued to send monthly mortgage statements to the Plaintiffs until
21 at least November 17, 2009 after the date of the foreclosure sale provided for by notice.

22 20. Defendant sent a letter rejecting Plaintiff's loan modification efforts on November 23,
23 2009, after having begun the foreclosure process and after the date set for foreclosure sale, but
24

1 encouraged Plaintiffs to continue to apply for and seek home modification as a means of
2 forestalling foreclosure.

3 21. Even after the date of the foreclosure Ocwen's representatives continued to indicate that a
4 loan modification was possible and that Plaintiffs could enter into a trial loan modification
5 program beginning in January 2010.
6

7
8 FIRST CAUSE OF ACTION – FRAUD

9 22. Plaintiff hereby incorporates paragraphs 1 through 21 into the First Cause of Action as
10 though fully set forth herein.
11

12 23. From the period of September to December 2009, agents of defendant, OCWEN LOAN
13 SERVICING, LLC, misrepresented to the Plaintiffs that they were eligible for a loan
14 modification, that Plaintiffs' efforts to seek modification had been successful, and that such
15 efforts had resulted in a trial period modification, which under HAMP would have prevented
16 foreclosure proceedings.
17

18 24. The fraudulent representations were made by agents of the Defendant, through
19 Defendant's mortgagor assistance line at 1-800-746-936 (1-800-74OCWEN). The agents were,
20 or claimed to be, employees of Ocwen and represented that they had the power to make loan
21 modification agreements on Ocwen's behalf.
22

23 25. Defendant Ocwen's agents falsely and fraudulently represented to Plaintiffs that Plaintiffs
24 were eligible for loan modification, that Plaintiffs had received a trial loan modification and that
25 negotiations for and entrance into the trial modification would forestall foreclosure of the
26 Plaintiffs' home while Defendants finalized a loan modification agreement.
27
28

1 26. When Plaintiffs voiced apprehensions about the impending foreclosure to Defendant's
2 agents, the agents informed them that Plaintiffs had no need for concern. The agents stated that
3 Ocwen had approved or would approve a trial period loan modification agreement and that the
4 modification and modification process acted to forestall foreclosure. On approximately
5 November 5, 2009 an agent of Defendant told Plaintiffs to wait 30 days for Defendant to review
6 Plaintiffs' application, inducing Plaintiffs' to refrain from action until after the foreclosure sale.
7

8 27. Defendant and Defendant's agents knew, or should have known, that a modification
9 agreement would not be forthcoming for the Plaintiffs, and instead Defendants had begun
10 foreclosure proceedings. Furthermore Defendant and Defendant's agents knew that during the
11 time Defendant made representations that Plaintiffs were in or could start a trial modification,
12 Defendant had started, and even completed foreclosure proceedings on Plaintiffs' property.
13

14 28. The intent of Defendant's misrepresentations was to cause Plaintiffs to believe that
15 foreclosure was not occurring on their property, or had been prevented by Plaintiffs' successful
16 efforts to make a loan modification agreement.
17

18 29. Plaintiffs relied on the misrepresentations of Defendants, and did not take action to
19 prevent to foreclosure on their property because they believed that foreclosure was prevented by
20 a HAMP trial modification, and had been falsely led to believe that Defendants had granted them
21 such a modification.
22

23 30. As a result of this justified reliance Plaintiffs have suffered damages in the form of the
24 loss of their family home to foreclosure.
25

26 SECOND CAUSE OF ACTION – FORECLOSURE INVALID

27 31. Plaintiff hereby incorporates paragraphs 1 through 30 into the First Cause of Action as
28 though fully set forth herein.

1 32. Defendants failed to follow California Civil Code §2924 when they conducted the
2 foreclosure process on the Property.

3 33. The Notice of Trustee Sale as recorded on October, 20, 2009 provided for a sale on
4 November 10, 2009, but no sale was conducted on that date.

5 34. A Trustee's sale was allegedly conducted on December 1, 2009 and no notice of this
6 postponement was recorded or provided.

7 35. As a result of this improper notice the transfer of the property was not conducted as
8 required under California Civil Code § 2924 and should be set aside as unfair and oppressive.
9

10
11 THIRD CAUSE OF ACTION – BREACH OF THE COVENANT OF GOOD FAITH AND
12 FAIR DEALING

13
14 36. Plaintiff hereby incorporates paragraphs 1 through 35 into the First Cause of Action as
15 though fully set forth herein.

16 37. Plaintiffs Loan Contract with the Defendants contained an implied covenant of good faith
17 and fair dealing that required Defendants to protect and otherwise care for the Plaintiffs rights
18 and assets. The covenant prohibited Defendants from actions interfering with and contrary to the
19 rights of the Plaintiffs.

20
21 38. Defendants actions, in failing to conduct the foreclosure properly and misrepresenting
22 that Plaintiffs received a loan modification that had or would prevent foreclosure interfered with
23 the Plaintiffs rights under their loan contract with New Century Mortgage.

24 39. The interference violated the Loan Contract's covenant of good faith and fair dealing.
25
26
27
28

1
2 FOURTH CAUSE OF ACTION – FORECLOSURE ACTION WAS CONTRARY TO PUBLIC
3 POLICY
4

5 40. Plaintiff hereby incorporates paragraphs 1 through 39 into the First Cause of Action as
6 though fully set forth herein.
7

8 41. Both State and Federal government have repeatedly addressed and sought to remedy and
9 assuage the harms caused by the recent decline in home values throughout the United States and
10 corresponding rise in foreclosures. These recent governmental efforts, such as the “Home
11 Affordability Modification Program” (HAMP) and California’s Civil Code § 2923.6 are part of a
12 long history of governmental efforts to regulate the home loan business and prevent abuses that
13 includes such as the laws as the Federal Home Owners’ Loan Act of 1933.
14

15 42. Recent or long-standing, these governmental regulations and laws were designed to
16 protect home buyers, especially in times of financial difficulty. Defendants misrepresented the
17 nature of the most recent Federal effort to prevent foreclosure with the intent to unjustly aid them
18 in completing a foreclosure, making the substance of the Defendants misrepresentations is
19 especially shocking.
20

21 43. The Federal Home Affordability Modification Program (HAMP) was enacted in March
22 2009 and clarified through Treasury Department Supplemental Directives as part of the
23 Emergency Economic Stabilization Act of 2008, codified in 12 USC §§ 5209 and 5211. The
24 legislative intent of these codes and the program created in response to them is to “maximize
25 assistance for homeowners and use the authority of the Secretary to encourage the servicers of
26 the underlying mortgages ... to minimize foreclosures.” 12 USC § 5211.
27
28

1 44. On July, 8, 2008 The California Legislature enacted § 2923.6 of the California Civil
2 Code. Section 2923.6 states that a mortgage servicer must act in the best interests of all investors
3 in and parties to a mortgage pool and that a “[mortgage] servicer acts in the best interests of all
4 parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or
5 implements a loan modification or workout plan.” As described in SB 1137, passed on July 2,
6 2009, the legislative intent of the code was to “avoid unnecessary foreclosures of residential
7 properties ... by facilitating the modification and restructuring of loans.”
8

9 45. The Federal “Home Owners’ Loan Act of 1933”, like California Civil Code § 2923.6 was
10 enacted “solely for the benefit of home owners who were in financial difficulties.” See Morrison
11 v. Landers, 56 Cal.App.2d 60, 7(1 Dist.1943).
12

13 46. None of these purposes can be served by allowing the mortgage servicers and lenders to
14 make misleading promises and deceptive assurances with the goal or effect of limiting
15 mortgagor’s response to foreclosure proceedings. The actions of the Defendants were predatory
16 and made only to ease the foreclosure process by inducing the plaintiffs not to act to protect
17 themselves from foreclosure.
18

19 47. That Defendants’ misrepresentations were presented as part of the federal Home
20 Affordability Modification Program (HAMP), makes them especially egregious. Some of
21 Defendants’ actions are now explicitly disallowed under HAMP guidelines.
22

23 48. When Ocwen continued the foreclosure actions while simultaneously offering to work
24 with Plaintiffs on a HAMP based loan modification, it failed to follow the programs guidelines.
25 Ocwen’s November 23, 2009 denial of the Plaintiff’s HAMP modification listed only that
26 Plaintiff’s had a “gross income less than the monthly payments determined by government
27 guidelines” as a justification for denial. The justification is inconsistent with program
28

1 guidelines, as debtors' income determines HAMP payment amounts, and the program itself sets
2 no minimum payment guidelines. Furthermore, Ocwen's letter of November 23, 2009 fails to
3 reject the Plaintiff's loan modification request for a reason recognized as legitimate by the
4 HAMP Supplemental Directive 09-06, p.14, Schedule IV.

5
6 49. Ocwen's overt failure to work within the guidelines of the HAMP program, shows a lack
7 of good faith on the Defendant's part.

8 50. Defendant's actions: of encouraging the Plaintiffs to seek loan modification, soliciting
9 loan modification information, and claiming that the Plaintiffs had received a modification while
10 simultaneously foreclosing on the same loan are against the public interest and intent of the
11 Federal and State government's efforts to prevent foreclosures.
12

13 **Prayer**

14 WHEREFORE, plaintiff prays for Judgment as follows:

- 15
16 1. That the court cancel the Trustee's Deed Upon Sale dated December 1, 2009, and
17 declare the transfer of the subject property of plaintiff to defendants as null and void.
18 2. For attorney's fees pursuant to the parties' agreement;
19 3. For costs of this suit; and
20 4. For such other and further relief as the court deems just and proper.

21 Respectfully Submitted,
22

23 Dated: June 2, 2010

Law Offices of Dean Lloyd

24
25 By /s/Dean Lloyd
26 Dean Lloyd
27 Attorney for Plaintiff
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